

### **REMARKS**

This is a full and timely response to the Office Action mailed October 7, 2009. For the second time during the pendency of this application, prosecution has been reopened upon Applicant's filing of an Appeal Brief. Claims 19-20 and 25-29 have been cancelled, and Applicant has not amended any other claims upon entry of this response. Applicant respectfully request reconsideration in light of the following remarks.

#### **I. New Rejections in the Office Action and Reopening of Prosecution**

As an initial matter, Applicant would like to state its concern over the examination of this application not being conducted in accordance with the guidelines and admonitions of the MPEP. For example, MPEP 707 states that "The Examiner's action will be complete as to all matters..." Further, MPEP 707.07(g) admonishes Examiners from performing piecemeal examination. Notwithstanding, the present Office Action has advanced new rejections of the pending claims and reopened prosecution of the pending application following the filing of an Appeal Brief by Applicant for a second time. Since the claims had been previously examined, Applicant would have expected any such rejections (if legitimate) to have been previously made. Such examination practice deteriorate the quality of examination, unduly delay the examination process, and also impose undue costs on Applicants.

Again, Applicant raises these issues to note, for the record, its concern that the Patent Office is not examining this application in accordance with the requirements of

the MPEP. Applicant trusts that all relevant prior art has now been identified and made of record in this matter, and Applicant will now address all outstanding rejections.

**II. Rejections Under 35 U.S.C. §102(e)**

A. Claims 1-4

The Office Action rejects claims 1-3 and 11-26 under 35 U.S.C. §102(e) as allegedly being anticipated by *Yeager, et al.* (U.S. Patent Publication No. 2003/0055894). For at least the reasons set forth below, Applicant respectfully traverses the rejection to the extent not rendered moot by amendment.

**Independent claim 1** recites:

1. (Previously Presented) A method performed by a first computer entity, said method comprising:
  - operating a peer to peer protocol for enabling said first computer entity to utilize a resource of a second computer entity in a peer to peer network, and for enabling said second computer entity to utilize a resource of said first computer entity in said peer to peer network; and
  - operating a process for managing said second computer entity,  
***wherein said process utilizes said resource of said first computer entity, and is invoked when said resource of said first computer entity is not being used by a service application at a higher level layer than said peer to peer protocol.***

(Emphasis added).

Applicant respectfully submits that claim 1 is patentably distinct from the cited art for at least the reason that the cited art does not disclose the features emphasized above. For a proper rejection of a claim under 35 U.S.C. §102, the cited reference must disclose, teach, or suggest all elements/features of the claim at issue. *See, e.g., E.I. du Pont de*

*Nemours & Co. v. Phillips Petroleum Co.*, 849 F.2d 1430, 7 U.S.P.Q.2d 1129 (Fed. Cir. 1988).

With respect to claim 1, the Office Action states (with emphasis added):

"Regarding claim 1 and 16, Yeager discloses a method performed by a first computer entity (Figs. 1A and 1B):

operating a peer to peer protocol for enabling said first computer (104A) entity to utilize a resource of a second computer (104B) entity of in a peer to peer network (106), and for enabling said computer entity to utilize a resource of said first computer entity in said peer to peer network (Page 16, [0212], page 17, [0214], which recites a peer includes a peer-to-peer application layer 150 that enables resources sharing between peer entities); and operating a process for managing said second computer entity (Page 15, [0203], which recites peer monitoring 128 operates process for managing functions of the peer), wherein said process utilizes said resource of said first computer entity (Page 17, [0219] and page 21, [0255], which recites a peer utilizes resources of other peers) and is invoked when said resource of said first computer entity is not being used a (sic) service application at a higher layer than said peer to peer protocol (Page 17, [0219] and page 21, [0255], which recites peers invoke network resources to be used by the peer groups. **Yeager does not teach that these peer services are being used by any other higher layer).**"

With respect to the above emphasized elements of claim 1, the Office Action apparently amazingly alleges that because Yeager **fails** to disclose that "peer services are being used by any other layer," the reference anticipates a peer to peer protocol that involves a process that utilizes a resource of a first computer entity, and is invoked when said resource of said first computer entity is not being used by a service application at a higher level layer than said peer to peer protocol. In other words, the Office Action is alleging that because the reference fails to disclose an element of the claim, that is anticipates a positive limitation of claim 1. Stated yet another way, it appears the Office Action's rejection sets forth that because the reference does not disclose element A, this means that it also somehow anticipates element A.

Applicant disagrees with the above position of the Office Action, and submits that the reference fails to disclose a peer to peer protocol that involves resource sharing between a first computer entity and a second computer entity where usage of resources of the second computer entity can be process utilizes said resource of said first computer entity, and is invoked when said resource of said first computer entity is not being used by a service application at a higher level layer than said peer to peer protocol. The reference fails to disclose restricting access to resources based upon whether the resource is being used by a higher layer.

Accordingly, Applicant respectfully submits that independent claim 1 is allowable for at least the reason that Yeager does not disclose, teach, or suggest each element of the claim. Additionally, for at least the reason that independent claim 1, as amended, is allowable over the cited references of record, dependent claims 2-4 and 21 (which depend from independent claim 1) are allowable as a matter of law for at least the reason that dependent claims 2-4 and 21 contain all the features of independent claim 1. See *Minnesota Mining and Manufacturing Co. v. Chemque, Inc.*, 303 F.3d 1294, 1299 (Fed. Cir. 2002) *Jeneric/Pentron, Inc. v. Dillon Co.*, 205 F.3d 1377, 54 U.S.P.Q.2d 1086 (Fed. Cir. 2000); *Wahpeton Canvas Co. v. Frontier Inc.*, 870 F.2d 1546, 10 U.S.P.Q.2d 1201 (Fed. Cir. 1989). Therefore, since dependent claims 2-4 and 21 are patentable over Yeager, the rejection of claims 2-4 and 21 should be withdrawn and the claims allowed.

B. Claims 11-15, 16-18, and 22-24

The Office Action rejects independent claims 11, 16 and 17 on the same basis as set forth above with respect to independent claim 1. Accordingly, Applicants submit that

independent claims 11, 16, and 17 are also allowable for at least the reason set forth with respect to claim 1. Likewise, Applicant submits that claims 12-15, 18, and 22-24 are allowable as a result of their dependence on allowable independent claims. Accordingly, Applicant respectfully requests that the rejection be withdrawn and the claims allowed.

### **III. Rejections Under 35 U.S.C. §103(a)**

#### **A. Claim 4**

The Office Action rejects claim 4 under 35 U.S.C. §103(a) as allegedly being unpatentable over *Yeager in view of Gleichauf et al.* (U.S. 7,137,145) and further in view of *Golle* (Incentives for Sharing in Peer-to-Peer Networks, 2001, Computer Science Department, Stanford University). Applicant submits that *Gleichauf* fails to disclose the above-noted deficiency of *Yeager*, and submit that claim 4 is allowable because of its dependence on allowable independent claim 1. Accordingly, Applicant requests that the rejection be withdrawn and the claim allowed.

### **IV. Miscellaneous Issues**

Any other statements in the Office Action that are not explicitly addressed herein are not intended to be admitted. In addition, any and all findings of inherency are traversed as not having been shown to be necessarily present. Furthermore, any and all findings of well-known art and official notice, or statements interpreted similarly, should not be considered well known for the particular and specific reasons that the claimed combinations are too complex to support such conclusions and because the

Office Action does not include specific findings predicated on sound technical and scientific reasoning to support such conclusions.

### ***CONCLUSION***

In light of the foregoing amendments and for at least the reasons set forth above, Applicant respectfully submits that all objections and/or rejections have been traversed, rendered moot, and/or accommodated, and that the now pending claims are in condition for allowance. Favorable reconsideration and allowance of the present application and all pending claims are hereby courteously requested. If, in the opinion of the Examiner, a telephonic conference would expedite the examination of this matter, the Examiner is invited to call the undersigned attorney at (770) 933-9500.

Respectfully submitted,

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